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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1961

No. 323

CLIFFORD VAUGHAN,
*Petitioner,*

VERSUS

N. J. ATKINSON, a non-resident, individually, and as Master; NATIONAL SHIPPING & TRADING CORPORATION, and AMERICAN WATERWAYS CORPORATION, both foreign corporations, as Owners and/or Operators of the American SS "NATIONAL LIBERTY,"
*Respondents.*

# RESPONDENT'S BRIEF ON THE MERITS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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# INDEX


| | | Page |
|---|---|---|
| I. | QUESTIONS PRESENTED | 1 |
| II. | STATEMENT OF THE CASE | 2 |
| III. | ARGUMENT | 4 |
| | Point I. The Seaman's Right To Maintenance And Cure Is A Part Of The Seaman's Contract Of Employment | 4 |
| | Point II. Maintenance Payments Due A Seaman While An Out-Patient Should Be Reduced By Any Earnings Of The Seaman During That Same Period | 8 |
| | Point III. Where Failure To Pay Maintenance Does Not Aggravate Seaman's Illness The Seaman Is Not Entitled To Damages Other Than Interest On The Maintenance Due And Owing | 12 |
| IV. | CONCLUSION | 14 |
| | TABLE OF CONTENTS | ii |

## TABLE OF CITATIONS


| | Page |
|---|---|
| *APOLLON, The*, 9 Wheat 373 | 13 |
| *Aquilar v. Std. Oil of New Jersey*, 287 U. S. 376 | 7 |
| *ATLANTIC, The*, 2 Fed. Cas. 121 | 7 |
| *Bartholomew v. Universe Tankship, Inc.*, 279 F 2d 911 (C.A.2) | 10 |
| *Benton v. United Towing Co.*, 120 F. S. 638, affirmed 224 F 2d 580 (C.A.5) | 10 |
| *Cortes v. Balt. Insular Line*, 287 U. S. 367 | 6, 13 |
| *Cresci v. Std. Fisheries*, 7 F 2d 379 (D.C.Cal.) | 7 |
| *Diniero v. U. S. Lines*, 185 F. S. 818, affirmed 288 F 2d 595 (C.A.2) | 9 |
| *Harden v. Gordon*, 11 Fed. Cas. 480 | 5 |
| *IROQUOIS, The*, 194 U. S. 241 | 5, 7 |
| *Johnson v. U. S.*, 333 U. S. 46 | 8 |
| *Loverich v. Warner Co.*, 118 F 2d 690 (C.A.3) cert. denied 313 U. S. 577 | 10 |
| *MARGARET, The, v. The CONNESTOGA*, 2 Wall Jr. 123, F. C. 9070 | 13 |
| *Olerichs v. Spain*, 15 Wall 211 | 12 |
| *OSCEOLA, The*, 189 U. S. 158 | 5 |
| *Perez v. Suwannee S. S. Co.*, 239 F 2d 180 (C.A.2) | 9 |
| *Ran v. Atlantic Refining Co.*, 87 F. S. 853 (E.D.Pa.) | 13 |
| *Reardon v. Cal. Tanker Co.*, affirmed 258 F 2d 704, Cert. denied 359 U. S. 960 | 10 |
| *Sprague v. Ticonic Bank*, 307 U. S. 161 | 13 |
| *Stankiewica v. United Fruit S. S. Corp.*, 229 F 2d 580 (C.A.2) | 10 |
| *Swift v. The HAPPY RETURN*, 23 Fed. Cas. 560 | 5 |
| *TROY, The*, 121 F 901 | 13 |
| *Tullock v. Mulvane*, 184 U. S. 497 | 12 |
| *Williams v. U. S.*, 228 F 2d 129 (C.A.4), Cert. denied 351 U. S. 986 | 10 |
| *Wilson v. United States*, 229 F 2d 277 (C.A.2) | 8, 9 |


## TEXT AND STATUTES


| | |
|---|---|
| Article 6 of the Laws of Oleron | 4 |
| Article 19 of the Laws of Wisbuy | 4 |
| Old Hansent Ord. 39 and 45 | 4 |
| 2 Brown, Adm. 182-184 | 4 |

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## QUESTIONS PRESENTED

I. Is The Seaman's Right To Maintenance And Cure Sufficiently Contractual So That The Seaman Has The Equivalent Of The So-Called "Duty" To Mitigate Damages.

II. Where Shipowners' Failure To Pay Maintenance Has Neither Caused Or Aggravated Petitioner's Illness Is The Petitioner Entitled To Damages Other Than Interest On The Unpaid Maintenance.

## STATEMENT OF THE CASE

The Statement of the Case contained in petitioner's brief is correct insofar as it goes. There are, however, other existing facts which are of importance and should, we feel, be brought to the attention of the Court.

The petitioner had never been to sea before he served on the SS NATIONAL LIBERTY from November 26, 1956 to March 2, 1957. Prior to signing on the SS NATIONAL LIBERTY, petitioner was engaged for many years as a taxi driver and owner of taxi cabs. On March 2, 1957, when petitioner signed off the NATIONAL LIBERTY, he did so at the end of a voyage and because the voyage had ended. He did not sign off on account of illness though he did obtain from the vessels' Master a certificate to permit him to be examined at the U. S. P. H. S. Hospital at Norfolk. This, however, is a common practice amongst seamen upon the completion of a voyage.

Though petitioner was examined initially at the U. S. P. H. S. Hospital at Norfolk on March 7, 1957, he was not admitted to that hospital until March 18, 1957, more than two weeks following his discharge from the SS NATIONAL LIBERTY. Upon being discharged to an out-patient status on June 6, 1957, petitioner forwarded to the shipowner's claims and insurance manager a certificate indicating he had entered the U. S. P. H. S. Hospital on March 18, 1957. Respondent shipowner was not advised that petitioner had been seen by the out-patient clinic of the Marine Hospital on March 7, 1957. Respondent then inquired of petitioner's superiors on board the SS NATIONAL

LIBERTY as to petitioner's illness, and was advised that petitioner had made no complaints during the four months he served on that vessel and that petitioner had been signed off the SS NATIONAL LIBERTY in normal course at the end of a voyage and not on account of sickness. In view of this investigation and in view of the apparent period of sixteen (16) days lapsing between the time petitioner signed off the SS NATIONAL LIBERTY and his admission to the U. S. P. H. S. Hospital at Norfolk, the respondent shipowner declined to pay any maintenance.

On June 6, 1957, the petitioner was discharged to an out-patient status from the U. S. P. H. S. Hospital at Norfolk at which time he was advised by his attending physician that he might engage in light work.

Though petitioner was discharged to an out-patient status on June 6, 1957, for some unexplained reason he did not see fit to employ counsel or in anyway further assert his claim for maintenance for a period of nearly a year and a half until January 1959.

On January 5, 1959, petitioner filed his libel in the District Court. On May 12, 1959, the District Court entered an interlocutory decree ordering the respondent shipowner to pay petitioner $8.00 per day plus interest at 6% for every day petitioner had been an out-patient less the amount of the wages earned by petitioner during the same period. The District Court further ordered that this formula should be adhered to in the future until such time as petitioner was fit for duty. The Court *did not* require petitioner to continue

to work. Notwithstanding the interlocutory decree of May 12, 1959, the petitioner continued to perform light duty as a taxi cab driver for the remainder of his out-patient treatment or for an additional period of over three months.

## ARGUMENT

### POINT I. THE SEAMAN'S RIGHT TO MAINTENANCE AND CURE IS A PART OF THE SEAMAN'S CONTRACT OF EMPLOYMENT.

In order that this Court might better evaluate the questions here presented, we will attempt to briefly review the ancient doctrine of maintenance and cure from its inception to modern times.

The doctrine of maintenance and cure is peculiar to the maritime law of nations. It has no analogy in the common law. Its exact origin is unknown. It is traced into antiquity through the laws of the maritime lands of the Mediterranean existing before the birth of Christ.

For centuries this basic and fundamental principle of the maritime law of nations, that a seaman injured in the service of his vessel was entitled to be cared for at the expense of the vessel and owner, remained unchanged. See *Article 6 of the Laws of Oleron; Article 19 of the Laws of Wisbuy; Old Hansent Ord. 39 and 45.* This doctrine was fully adopted and completely integrated into the early maritime laws of England. *2 Brown, Adm. 182-184.* The earliest learned discussion of maintenance and cure by our Admiralty Courts

in the United States is found in the opinion of Circuit Judge Story, delivered in *Harden v. Gordon, 11 Fed. Cas. 480,* handed own in 1823. However, as early as 1799 in the recorded opinion of District Judge Peters in *Swift v. The Happy Return,* 23 Fed. Case 560, fn 2, there is found a brief discussion of this doctrine. This ancient principle of the Maritime Law of Nations was accepted without modification by the Admiralty Courts of our newly formed United States. Though the doctrine of maintenance and cure had been discussed by many lower Federal Court following our national birth, it was not until 1903 that this Court in *The Osceola,* 189 U. S. 158, referred to this ancient doctrine in the following words:

> "* * * the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued."

A year later in 1904, this Court rendered its decision in *The Iroquois,* 194 U. S. 241. This latter decision in no way modified the basic doctrine of maintenance and cure but merely set forth the duty of a master of a vessel to put to the nearest port when a critically injured seaman was on board and further intimating that if the master failed in this duty and the seaman's condition suffered thereby, then the seaman might well have an additional cause of action for the physical injuries, if any resulting.

For the next twenty-nine years there was no significant pronouncement on the subject by this Court.

In 1932, Justice Cardoza delivered the opinion in *Cortes v. Baltimore Insular Line,* 287 U. S. 367. This opinion is notable, not in that it in any way changed the ancient doctrine of maintenance and cure, but rather, in that it stated in clear and precise terms this age old principle of maritime law. In *Cortes, supra.,* the seaman libellant contracted pneumonia and died while serving on respondent's vessel. The decedent's administrator charged that the master failed to give the seaman proper care. After reciting that a seaman has a right to recover for an unseaworthy condition, Justice Cordoza went on to say:

> "A remedy is his also if the injury has been suffered through breach of the duty to provide him with 'maintenance and cure'. The duty to make such provision is imposed by law itself as one annexed to the employment. The Osceola, 189 U. S. 158 47 L. Ed. 760, 23 S. Ct. 483, supra, Contractual it is in the sense that it has its source in a relation which is contractual in origin, but given the relation no agreement is competent to abrogate the incident. If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has his right of action for the injury thus done to him, the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt. *The Iroquois,* 194 U. S. 240, 48 L. Ed. 995, 24 S. Ct. 640, 16 AM. Neg. Reg. 638."

Justice Cardoza concluded, and rightly so, that if the failure of the master to furnish maintenance and cure:

> "has caused or aggravated an illness the seaman has his right of action for the injury thus done to him".

This proposition was recognized in *The Iroquois*, supra.

The other proposition, long recognized under the maritime law, but set forth by Justice Cardoza in *Cortez, supra* ,was that the right to maintenance and cure "has its source in a relation which is contractual in origin * * *" Again this was no new idea, but rather a well accepted principle of law recognized by our Admiralty Court as early as 1849. In the *Atlantic 2 Fed. Cas 121 (1849)* is found this statement of Judge Betts:

> "A fundamental doctrine applicable to mariners' contracts, and one regarded in Maritime law as forming a part of the contract, is the right of the seamen to be cured at the expense of the ship, of sickness or injury received in the ship's service."

The fact that the right to maintenance and cure has its origin in contract has been followed by lower admiralty courts in determining such matters as whether the tort or contract statute of limitations should apply by analogy where a plea of laches is made to a claim for maintenance and cure. (See *Cresci v. Std. Fisheries*, 7 F. 2d. 379 (D.C. Cal.), where contractual statute of limitation of California was applied by analogy).

In 1943 in *Aquilar v. Std. Oil of New Jersey*, 287 U. S. 367, this Court said, speaking of the obligation of the shipowner to provide maintenance and cure:

> "In the United States this obligation has been recognized consistently as an implied provision in contracts of marine employment."

## POINT II. MAINTENANCE PAYMENTS DUE A SEAMAN WHILE AN OUT PATIENT SHOULD BE REDUCED BY ANY EARNINGS OF THE SEAMAN DURING THAT SAME PERIOD.

The pertinent portion of petitioners union contract relating to maintenance is set forth on page 3 of petitioner's brief. This provision merely sets a rate which shall be paid a seaman when he is *"entitled to maintenance and cure under Maritime Law."* The question then arises as to whether under the Maritime Law this amount should be reduced by wages earned by the seaman during the period he is entitled to maintenance and cure.

In *Johnson v. U. S.*, 333 U. S. 46, this Court held that under the Maritime Law a seaman who was living without cost to himself on his parent's ranch while an out-patient, was not entitled to maintenance payments. In affirming the two lower Court's denial of maintenance, Mr. Justice Douglas said, speaking for the majority:

> "* * * there is ample evidence to support the findings of the two lower courts that petitioner had incurred no expense or liability for his care and support at the home of his parents".

Though the *Johnson case, supra,* is not entirely in point, it does indicate that this Court recognizes the equity of reducing the vessel owners' liability for maintenance payments when to do otherwise would permit the seaman to reap a profit.

Perhaps the closest decision to the case at bar is the decision of the Second Circuit in *Wilson v. United*

*States*, 229 F. 2d 277 (C.A.2). In the *Wilson case, supra*, the Court allowed the seaman $8.00 per day for maintenance while an out-patient from the U. S. P. H. S. Hospital at Baltimore, Maryland, mitigated by whatever amount the seaman earned during the period he was an out-patient. For the days the seaman did not work he was allowed $8.00 per day just as the District Court awarded Vaughan in the case at bar. The basic principle behind the reasoning of Judges Hand, Medina and Frank of the Second Circuit in *Wilson, supra*, is found on page 281, wherein it is stated that the duty to furnish maintenance:

> "* * * is sufficiently contractual so that the seaman has the equivalent of the so-called duty to mitigate damages".

In *Perez v. Suwanee Steamship Co.*, 239 F. 2d 180 (C.A.2), at page 181, in a per curiam opinion rendered by Second Circuit Judges Hand, Medina and Lumbard, in connection with a seaman's award for maintenance, where the lower court failed to reduce the award by the amount earned by the seaman during the same period, the Court said:

> "We cannot, however, agree with the refusal to deduct from the award the wages earned by the plaintiff as dishwasher during the period of incapacity."

In *Diniero v. U. S. Lines*, 185 F. S. 818, affirmed 288 F. 2d 595 (C.A.2), where the libellant was covered by a collective bargaining agreement which set the rate of maintenance at $8.00 per day, the Court said after computing the total maintenance due at the rate of $8.00 per day:

"Of course, from that should be subtracted the wages that he earned."

In *Loverich v. Warner Co.*, 118 F. 2d 690, (C.A.3), the Third Circuit Court of Appeals in a similar case said:

> "The unit cost of maintenance in this case has been stipulated between the parties as $2.00 per day. The case is remanded with directions to enter judgment for the libellant at this rate as follows: From the period of his discharge to the present, excluding therefrom (a) periods when he was employed for wages by other employers and (b) periods when he was hospitalized under circumstances where he was under no expense."

See also *Bartholomew v. Universe Tankship, Inc.*, 279 F 2d 911, (C.A.2); *Rearden v. California Tanker Co.*, affirmed 258 F 2d [illegible], certiorari denied 359 U. S. 960; *Benton v. United Towing Co.*, 120 F. S. 638, affirmed 224 F 2d 558; *Stankiewica v. United Fruit S. S. Corp.*, 229 F 2d 580; *Williams v. U. S.*, 228 F 2d 129, certiorari denied 351 U. S. 986.

In the case at bar, the libellant was advised by his attending physician at the U. S. P. H. S. Hospital that he could perform light work while an out-patient.

The work performed by Vaughan during his out-patient treatment was that of a part time taxi driver in the City of Newport News, Virginia. It was an activity in which petitioner had engaged for most of his adult life prior to his two brief (and only) sea voyages on the SS NATIONAL LIBERTY.

It is, we believe, of considerable significance that even following the District Court's interlocutory decree of May 12, 1959, the libellant continued to work as a part time taxi driver, though he was not declared fit for duty until August 19, 1959, over three (3) months later. During this entire period, the vessel owner was promptly abiding by the aforementioned decree which awarded libellant $8.00 per day less his daily earnings as a taxi driver. The petitioner cannot possibly urge that during this period he was forced by economic necessity to work. This, we believe clearly shows that petitioner's working was a thing of his own choice.

In this case, the seaman was capable of performing light work without injury to his health. In fact, the performance of this light duty was undoubtedly most beneficial to his mental state of mind. If a seaman is able to work, it is only just and equitable that he should be required to mitigate the shipowner's maintenance cost. To hold otherwise would encourage an abuse of the right to maintenance granted seaman under the maritime law.

It should be remembered in this case also that the petitioner was at all times furnished adequate medical care while an out-patient at the U. S. P. H. S. Hospital at Norfolk. The only question here involved relates to the non payment of maintenance.

**POINT III. WHERE FAILURE TO PAY MAINTENANCE DOES NOT AGGRAVATE SEAMAN'S ILLNESS THE SEAMAN IS NOT ENTITLED TO DAMAGES OTHER THAN INTEREST ON THE MAINTENANCE DUE AND OWING.**

The petitioner retained counsel in this case on a fifty (50%) percent contingent contract. It is the petioner's position that he should be able to recover as an element of damage the fee he must pay his proctor.

We know of no authority which would support such a proposition. In fact, the authorities and logic itself are to the contrary. This point was long ago decided by this Court in *Oelrichs v. Spain,* 15 Wall 211, and cited with approval in *Tullock v. Mulvane,* 184 U. S. 497 at page 512, where the Court said:

> "In debt, covenant, and assumpsit damages are recovered, but counsel fees are never included."

The reasoning behind this ruling is an equitable one and is set forth by the Court in the *Oelrichs case, supra,* as follows:

> "The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the expensa litis to which he may have been subjected. The parties in this respect are upon a footing of equality."

The proposition set forth on page 10 of petitioner's brief that a failure to furnish maintenance when due gives rise to a cause of action in damages whether or not it is satisfactorily demonstrated that such failure aggravated the petitioner's condition is in direct op-

position to this Court's holding in *Cortes v. Baltimore Insular Line, supra.* The four cases cited by petitioner in his brief at page 10 in support of this novel theory are all totally inapplicable.

In *The TROY,* 121 F 901, the allowance was limited to living expenses and some compensation for suffering endured by the seaman by reason of not having care and attention as required under the circumstances of his case. But as District Judge Hoffman found in the case at bar:

> "There is no indication of any physical or mental suffering."

In *Ran v. Atlantic Refining Co.,* 87 F. S. 853, it was only determined that the seaman's right of action for maintenance and cure arises on a day-to-day basis. No question of damages was presented or determined by the Court in that case.

In *The APOLLON,* 9 Wheat. 373, 379 (1824), cited as authority for the proposition that counsel's fee may be allowed in admiralty was overruled more than a century ago in *The MARGARET v. The CONNESTOGA,* 2 Wall Jr. 123, F. C. 9070. Furthermore, *The APOLLON, supra,* limited such recovery to cases of prize and seizure in admiralty.

*Sprague v. TICONIC BANK,* 307 U. S. 161 is inapplicable as it refers to the right of a petitioner bringing a class action to recover attorney's fees and cost from the fund recovered for the class as a result of the single petitioner's effort and expense. It does not involve the question of a plaintiff recovering attorney's

fees from a defendant in a simple two party contract or tort action.

## CONCLUSION

(1) The seaman's right to maintenance arises out of his contract of employment.

(2) If the seaman is able to earn monies during his period of maintenance the basic maintenance to which the seaman is entitled should be reduced by the amount of these earnings.

(3) There is no authority for awarding a seaman attorney's fees in connection with a claim for maintenance.

WHEREFORE, respondent respectfully submits that the Judgment of the Court of Appeals below should be affirmed.

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